RECEIVED

Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

JUL 11 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Implementation of the Commission's Equal Employment Opportunity Rules MM Docket No. 94-34

TO THE COMMISSION

REPLY COMMENTS OF THE LEAGUE OF UNITED LATIN
AMERICAN CITIZENS, THE MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL, THE NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED PEOPLE, THE NATIONAL
BAR ASSOCIATION AND THE OFFICE OF COMMUNICATION OF
THE UNITED CHURCH OF CHRIST

Dennis Courtland Hayes
General Counsel
Everald Thompson
Assistant General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(301) 486-9193

David Honig
Executive Director
Minority Media and
Telecommunications Council
3636 16th Street N.W. B-863
Washington, D.C. 20010
(202) 332-7005

July 1, 1994

Lisa Stevens
Fellow
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue N.W.
Washington, D.C. 20001
(202) 662-9535

Anthony Pharr
Director, Washington Office
Office of Communication of the
United Church of Christ
2000 M Street N.W. 4th floor
Washington, D.C. 20036
(202) 331-4265

No. of Copies rec'd_ List ABCDE

TABLE OF CONTENTS

			<u>Page</u>
	INTF	RODUCTION	1
I.	EEO	COMPLIANCE PROCEDURES AND STANDARDS	3
	Α.	"Deregulation" Of Form 396 Is Completely Unwarranted	3
	В.	The Commission Should Expand The Number Of Job Categories Listed On Form 395	4
	c.	No Category Of Broadcasters Should Be Exempt From EEO Compliance	4
	D.	Small Market Broadcasters Should Have No More Difficult Time Complying With The EEO Rule Than Do Large Market Broadcasters	6
		Industry Commenters Have Failed To Document The Unwillingness Of Minorities And Women To Work For "Small Stations"	8
		An Exemption For "Small Stations" Is Unwarranted	11
		 Industry Commenters Do Not Understand Commission Policy Placing Emphasis On Efforts Rather than Numerical Standards 	12
		4. The Paperwork Burden Falls Least Upon "Small Stations"	13
	Ε.	Low Salaries Are Not An Impediment To EEO Compliance	15
	F.	Broadcasters Should Not Be Permitted To Use Alternative Labor Force Data	16
	G.	Joint Recruitment Efforts Are Permitted Now. What Some Industry Commenters Appear To Seek Is A Shift In Responsibility For EEO Compliance To Non-Accountable, Non-Licensees	17
	н.	Training of Minorities Should Be A Factor In Meeting EEO Obligations.	19

Table of Contents (continued)

			Page
	I.	The EEO Rule Should Extend To Persons With Disabilities	19
	J.	Broadcasters Should Be Encouraged To Do Business With Minority Vendors	20
II.		ISSION EVALUATION OF BROADCASTERS' EEO ORMANCE	21
	Α.	A Licensee Which Has Met The Processing Guidelines, But Not The "Efforts" Requirement, Should Not Be Deemed To Have Complied With the EEO Rule	21
	В.	The Commission Must Continue To Monitor Licensees' Recruiting Efforts	22
	c.	Designation for Hearing Should Not Await Three License Terms of EEO Violations	24
	D.	The Forfeitures Issued Since February 1, 1994 Should Remain In Effect	25
III.	THE URGENT NEED FOR COMMON CARRIER EEO REGULATION		27
	Α.	FCC Oversight Of Common Carriers Is Fully Warranted To Promote EEO In Upper Management	28
	В.	Common Carriers Which Have Won The Right To Offer Cable Service Should Be Subject To The EEO Provisions Of The Cable Act	30

* * * * *

INTRODUCTION

The NAB's Executive Summary points out that minorities and women have made significant strides toward equal opportunity in broadcasting since 1975. What the NAB and some other industry commenters may have forgotten is that until the EEO Rule was adopted in 1969 -- that is, for the first 60 years of broadcasting -- minorities and women made virtually no strides toward equal opportunity. Furthermore, during the period from 1964 to 1969, when only Title VII protected minorities and women from discrimination in broadcasting, progress toward equal opportunity was insignificant. That is why the Commission found that regulation was necessary.

Now the NAB and some other industry commenters want to turn back the clock thirty years to 1964, eviscerating the EEO Rule just at the moment in history when the broadcasting industry has full equal opportunity within its grasp. Instead, the Commission should stay the course, and indeed should accelerate EEO enforcement with a goal of eliminating the scourge of discrimination from broadcasting within ten years, and attaining 100% of parity for minorities and women at all levels in broadcasting within 15 years. Only when regulation is no longer needed to sustain equal opportunity should regulation be abandoned. As evidenced by the unhelpful and often mean spirited comments from some of the industry parties, we are obviously nowhere near that day. EEO compliance does not yet appear to be either a high industry priority or a standard industry norm.

Indeed, the mean spiritedness of so many of the industry comments reveals a profound lack of awareness or recollection of history. Many of the commenters appear to have forgotten that the

EEO Rule was adopted with universal support -- except from one commenter, the NAB. See Nondiscrimination in Broadcasting, 13 FCC2d 766 (1968). They have forgotten that for the first six of broadcasting's nine decades, minorities could not work anywhere in broadcasting no matter what their qualifications. They have forgotten that Thurgood Marshall's 1955 interview with Douglas Edwards wasn't carried by WLBT-TV in Jackson, Mississippi because of "cable trouble." Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 998 (D.C. Cir. 1966) ("UCC I"). They have forgotten that Nat King Cole's television program had to be cancelled in 1956 because southern stations wouldn't carry it. They have forgotten that a Columbus, Mississippi radio station helped incite the riot at the University of Mississippi in which two people died in the struggle to enable James Meredith to enroll. The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965). They have forgotten that in 1972, one Rochester, NY radio owner characterized only certain types of jobs as "suitable" or "feasible" for minorities, and another used a "Job Application -Male" form for announcers and a "Job Application - Female" form for secretaries. Rust Communications Group, Inc., 53 FCC2d 355, 363 (1974) ("Rust") and Federal Broadcasting System, Inc., 59 FCC2d 356 They have forgotten that after rejecting well qualified (1976).secretarial job candidate Linda Johnson, broadcast licensee Henry Serafin asked Buffalo CETA caseworker Cheryl Gawronski "don't you have a white girl to send me? She [Ms. Johnson] would make charcoal look white. " Catoctin Broadcasting Corp. of New York, 4 FCC Rcd 2553, 2555 (1989) (subsequent history omitted). They have forgotten that a Norfolk television station held its Christmas party at a segregated country club and had to tell the Black

employees that it was very sorry, they couldn't come. WAYY-TV Television, Inc., 53 RR2d 655, 658 (1983). They have forgotten that even as they worked side by side with whites at two Philadelphia radio stations, Blacks earned only 40% of the whites' Banks Broadcasting Company, MM Docket No. 85-65, FCC 85-122 pay. (released April 4, 1985). They have forgotten that radio stations in Greenwood, Mississippi and Beaumont, Texas changed their formats from Black to country/western and fired their Black employees without giving them a chance to try out in the new format. Leflore Broadcasting Company, Inc. v. FCC, 636 F.2d 454 (D.C. Cir. 1980) and Beaumont NAACP v. FCC, 854 F.2d 501, 508 (D.C. Cir. 1988). They have forgotten that a St. Louis radio station defended its failure to recruit Blacks by asserting that Blacks seldom listen to classical music. The Lutheran Church/Missouri Synod, 9 FCC Rcd 914 (1994). They have forgotten that even today, in major cities like New York and Los Angeles, minorities are represented on the staffs of major television stations at only 60-85% of their representation in the community, and that the EEO records of even very similar licensees differ substantially. See Exhibit 1 hereto. Thus, they may not know that years of discrimination have left with minorities with tremendous ground to make up. And they may not know that discrimination is still the broadcasting industry's greatest shame.

I. EEO COMPLIANCE PROCEDURES AND STANDARDS

A. "Deregulation" Of Form 396 Is Completely Unwarranted

The NAB, at 30, opposes requiring all licensees to provide additional information regarding their hiring activities "in order to <u>perhaps</u> find a <u>few</u> more violators" (emphasis in original). The Commission should reject this argument. Licensees already control

all of the paper flow in an EEO investigation, and thus have the ability to conceal any noncompliance. Without complete information from all licensees, it is impossible to know who is complying and who is not complying. Even if additional information in Form 396 only uncovers "a few" discriminators, it is worth it, because the industry should not tolerate even one discriminator. Licensees which comply with the EEO Rule have nothing to fear from disclosing the full details of their compliance program; indeed, they should be proud to do so. See Comments of the Foundation for Minority Interests in Media, at 3.

B. The Commission Should Expand The Number Of Job Categories Listed On Form 395

Commenters continue to support expanding the number of job categories listed on Form 395. In response to CBS' comment that the Commission has not given a valid reason for changing the job categories, Commenters note that the current job categories do not accurately reflect job responsibilities and therefore hinder the Commission's ability to assess the number of women and minorities in upper management. The term "officials and managers" is vague and could include employees who have no decision making authority. Further, expanding broadcast job categories would make licensee reporting more consistent with cable reporting. See Comments of National Hispanic Media Coalition at 9.

C. No Category Of Broadcasters Should Be Exempt From EEO Compliance

Commenters disagree with the University of Missouri, which advocates that public institutions be exempt from the Commission's EEO guidelines on the basis that they are already subject to fair hiring regulations as contractors with the federal government.

Comments of the Curators of the University of Missouri at 5. The

University misses the point that broadcast licensees have different obligations to the public than do institutions which contract with the federal government generally. The Commission requires a more extensive EEO process because of the nexus between the levels of minority and female employment and diversity of viewpoints presented. NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976). Diversity of views presented through broadcast stations is no less important in small markets, especially small markets served by public institutions. The University's television and radio stations must operate within the public interest. They are therefore subject to more stringent guidelines to see insure that they employ fairly and affirmatively.

The Commission's original orders adopting and refining the EEO Rule made it clear what the Rule was designed for. <u>See</u>

Nondiscrimination in Broadcasting, <u>supra</u>, 13 FCC2d 766. The

Commission expressly rejected the argument of the NAB that the EEO Rule would be unnecessary because Title VII protects individual discrimination victims. Instead, because broadcasting leads the nation in setting an example of moral conduct or misconduct, 1/

because broadcasting is a public trust embedded with special obligations to minority groups, 2/ because there is insufficient spectrum for both law-abiding and law-breaking applicants to

Nondiscrimination in Broadcasting, supra, 13 FCC2d at at 771 (citing with approval the Department of Justice' comment that owing to the "enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries.")

^{2/} Programming Policy Statement (1960); see Blue Book (1945).

occupy, $\frac{3}{}$ and because diversity in viewpoints is furthered by diversity in staffing, $\frac{4}{}$ we have an EEO Rule which absolutely does, and should go beyond Title VII in scope and application. This has been settled law for a generation.

In Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 533 (2d Cir. 1977) ("UCC III"), the Court reminded the FCC that it "does not argue, nor could it, that the need for equal employment opportunity has become less urgent."

That admonition rings even more true today after twelve years of nonbenign neglect which saw the elimination of virtually every structural and nonstructural public interest protection except the EEO Rule.

Thus, far from exempting categories of licensees, the Commission should continue to correct the effects of its twelve year period of near-abstention from meaningful EEO regulation.

D. Small Market Broadcasters Should Have No More Difficult Time Complying With The EEO Rule Than Do Large Market Broadcasters

Some industry commenters argue that EEO requirements are overly burdensome and unnecessary for "small stations". 5/ The NAB, for example, maintains that "small stations" should be relieved from "burdensome recordkeeping requirements" and that "formalized efforts should be secondary." NAB Comments at 16; see also Texas Association of Broadcasters ("TAB") Comments at 14; Licensees of

^{3/ &}lt;u>UCC I</u>, <u>supra</u>, 359 F.2d at 1003.

^{4/} NAACP v. FPC, supra, 425 U.S. at 670 n. 7.

^{5/} NAB defines "small stations" to mean broadcasters "whose main studio is located in a predominantly rural area" as well as licensees with fewer than 15 fulltime employees serving all market sizes. NAB COmments at 12.

Ninety-Eight Broadcast Stations ("Ninety-Eight Licensees") Comments at 14; Dow Lohnes Comments at 8.

It is always attractive to push the small market button, and the NAB is using that tactic here. The NAB is attempting to make the small market broadcaster into a poster child for a nonexistent illness. The real illness is discrimination in the media. Small market broadcasters are hardly immune from that illness.

Some of the industry comments reflect a lack of commitment to the principle of affirmative action, as well as a case of amnesia with respect to Commission policy. In 1987, the Commission, at industry's urging, 6/ decided to place emphasis on efforts as opposed to numbers. Since that time the Commission has focused upon enforcing a five-point affirmative action program that requires licensees to recruit, promote, and retain minorities and women in a nondiscriminatory manner even after numerical guidelines have been met. 2/

Now some industry commenters seek to have the Commission dismantle its EEO policy with respect to "small stations" -- a group which, unfortunately, includes some of the most egregious EEO violators. To grant the requested relief would serve no other purpose than undermine EEO enforcement and reverse the minimal progress that has been achieved over the past two decades.

Commenters note that the Commission has already provided relief for those very small market broadcasters whose remoteness

^{6/} In its Comments in the 1987 EEO proceeding, the NAB stated that it supported the Commission's desire to go beyond numbers in its review of EEO performance. Report and Order, 2 FCC Rcd 3967, 3974 ¶47 (1987) ("1987 EEO Report and Order").

<u>7</u>/ <u>Id.</u> at para 50.

from the rest of civilization may arguably make compliance somewhat more expensive. Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rule, 9 FCC Rcd 929, 936 (Appendix), Criterion VIII (downward adjustment for stations in markets under 200). The Commission has very wide discretion on where to draw the numerical lines. See FCC v. Beach Communications, Inc., 113 S.Ct. 2093, 2102 (1993) ("Beach"). On this record, it cannot be said that the 200th market is not the right place to have drawn the line.

 Industry Commenters Have Failed To Document The Unwillingness Of Minorities And Women To Work For "Small Stations"

In an attempt to justify an exemption for "small stations", NAB alleges that the compensation offered by such stations is insufficient to attract qualified minorities and female employees.

NAB Comments at 13-16.

However, aside from self serving quotations supplied by the very same stations that would benefit from the regulatory exemption, the record of this proceeding does not demonstrate that significant numbers of minorities and women are unwilling to work for "small stations". Of the scores of minority and female referral sources, not one has submitted comments in support of the claim that qualified minorities and women cannot be identified for job vacancies at "small stations."

There is absolutely no evidence that minorities are any less willing than whites to work in small markets. In order to accept the premise advanced by NAB, the Commission would have to also accept the argument that even qualified non-minorities and males are unwilling to work at "small stations"; and that is patently untrue. Indeed, due to the legacy of discrimination

and unequal opportunity over the years, it is still easier for broadcasters to hire minorities for entry level positions -- and positions in small market stations -- than for highly skilled or large market positions.

The low-wage rates quoted by NAB and TAB only serve to underscore the desperate realities of today's job market. NAB Comments at 14; TAB Comments at 9. Historically, broadcasting has always been an employer's market in which the number of qualified job applicants far outnumber the high paying job vacancies at major market stations.

According to Dr. John T. Barber, Chairman of the Department of Telecommunications at Morgan State University, minority communication majors are "constantly encouraged to pursue small markets to obtain their first jobs." Accepting a low-paying position at a small market station is a common practice among communications majors:

Our professors and students understand that a Bachelor of Science of Bachelor of Arts degree in communications usually yields little until the recipient "pays some dues." Paying dues frequently means working in small markets before gaining employment in larger ones. This is a typical career strategy for a black communication graduate.

Declaration of Dr. John T. Barber at 2 (appended at Exhibit 2 hereto).

^{8/} See Statement of Dr. John T. Barber at 2:

Let it be stated clearly then, that the Department of Telecommunications at Morgan State University stands ready, willing and able to identify and present minority graduates, mainly African American, who are prepared to take jobs in small market broadcast and cable positions.

Id. at 3 (emphasis added).

Dr. Jannette Dates, Acting Dean at the Howard University School of Communications, further explains:

Howard University graduates continue to qualify for employment in small markets as is evidenced by the School's alumni..... However, something is obviously amiss when one considers that a greater number of our alumni find employment in medium to large markets than in small markets....Further demonstration of the competencies of the School's alumni comes by way of its Annual Job Fair. Nationally recognized recruiting organizations have continuially participated in the event largely due to the quality of the candidates that they interview and hire. For over 20 years, solicitation has gone out to stations in small, medium and large markets to participate in this large minority recruiting effort. Yet, as noted, very few small market groups participate in the Job Fair.

Declaration of Dr. Jannette L. Dates at 3 (appended at Exhibit 3 hereto).

Based upon the placement experience of institutions such as Howard University and Morgan State University, the problem of identifying minority candidates lies with the stations and not referral sources. 2/ Well qualified minorities graduate each year from the scores of accredited schools of communications. The thousands of applicants that are unsuccessful in obtaining high salaried positions in the major markets have no other choice but to accept lower-salaried positions at "small stations". As demonstrated by the declarations supplied by Drs. Barber and Dates, there are ample numbers of minorities well qualified for "small stations" to fill their employment requirements.

[&]quot;I find it difficult, however, to identify small market broadcast and cable employers who are ready, willing and able to hire our graduates. Such employers have hardly reached out to open lines of communication about employment with us nor have any come to our campus to recruit our fine students." Statement of Dr. John T. Barber at 3.

2. An Exemption For "Small Stations" Is Unwarranted

NAB's request for an exemption for "small stations" contradicts its "commitment...to provide equal employment opportunities for women and minorities. NAB Comments at 2. This is the same exemption rejected by the Second Circuit in <u>UCC III</u>, supra because the Commission could not claim that the need for equal employment opportunity had evaporated between 1967 and 1977. The Commission still cannot and presumably would not make any such claim.

According to NAB,

[I]t would be appropriate to relieve ["small stations"] from the burden of demonstrating their efforts to attract female and minorities, so long as there is no history of discrimination.

NAB Comments at 13 (emphasis added).

Discrimination has frequently occurred at "small stations". It would be, therefore, inappropriate to grant the relief sought by NAB.

An analysis of financial forfeitures assessed between 1988 and 1991 indicates that "small stations" 10/ received the vast majority of penalties - 35 out of 46 (76 percent). Stations in the top 25 markets that employ the largest workforces in the industry received only three penalties. See Exhibit 4 hereto (providing illustrative examples).

For the same reasons that other classes of licensees should not be exempted from EEO requirements (<u>see pp. 4-6 supra</u>), small stations should not be so exempted.

^{10/ &}quot;Small stations" are defined here to mean stations located in ADI markets 51 and above.

3. Industry Commenters Do Not Understand Commission Policy Placing Emphasis On Efforts Rather than Numerical Standards

A number of broadcasters $\frac{11}{}$ oppose Commission policy that requires affirmative action efforts to be continually implemented even after processing guidelines have been met. $\frac{12}{}$

Quantitative tests were never intended to be any more than processing guidelines designed to ensure uniformity and fairness in evaluating station employment practices. Stations that meet or exceed numerical standards cannot rely upon them as "safe harbors". 13/ On the other hand, stations that fail to meet numerical standards, but that also demonstrate that affirmative action efforts have been undertake on a continuous basis, are not subjected to FCC sanctions. The Commission should, therefore, disregard the claim 14/ that broadcasters are unfairly punished even though they satisfy processing guidelines.

With respect to "small stations", some industry commenters seek an exemption from the recordkeeping requirement. 15/ Under an efforts-based policy, the need for record-keeping is essential. It is the only mechanism available to the Commission and the public for determining whether a station has carried out its affirmative

^{11/} NAB Comments at 9; CBS Comments at 2; Tribune Broadcasting Comments at 3.

^{12/} The use of processing guidelines "is not intended to imply that stations meeting the specific employment levels thereunder necessarily will be considered to have satisfied their EEO obligations." 1987 EEO Report and Order.

^{13/ 1987} EEO Report and Order, supra, 2 FCC Rcd at 3974 ¶50.

^{14/} TAB Comments at 5.

^{15/} TAB Comments at 12; NAB Comments at 16, Ninety-Eight Licensees Comments at 15.

action duties and responsibilities. To dispense with recordkeeping would be to render enforcement totally ineffective.

The excuse of "unable to attract qualified minorities" is a worn-out argument used as a subterfuge 16/ by some companies driven by an unwillingness to accept the multi-cultural workplace of the 21st century. Knowing full well that sanctions have never been imposed due to the failure to satisfy numerical standards alone, some commenters seek to forestall justly deserved sanctions. 17/ As demonstrated in the next subsection, such sanctions are fully warranted due to the failure of some small stations -- and large ones -- to maintain records and earnestly undertake affirmative action.

4. The Paperwork Burden Falls Least Upon "Small Stations"

The alleged high cost of EEO paperwork apparently falls least upon stations in small markets. According to TAB, MetroMarket stations spend \$37,400 while small market licensees expend less than 10 percent of that figure - \$350. The annual cost of \$350 flies in the face of the assertion that "[u]nwieldly recordkeeping can place an undue hardship on [small station] operations...." NAB Comments at 16, see also Ninety-Eight Licensees Comments at 15.

^{16/} TAB's assertion that broadcasters have to interview "winos who come off the street" in order to meet new EEO requirements is absolutely baseless. TAB Comments at 7.

^{17/} Sanctions result in a substantial improvement in station employment profiles according to a historical analysis of financial forfeitures. Comments of LULAC et al. at 6.

Despite their questionable accuracy, 18/ TAB's recordkeeping cost estimates serve only to show that "small stations" do an inadequate amount of recordkeeping. This is consistent with the pattern of discrimination that occurs extensively at such stations.

The <u>de minimis</u> cost of paperwork incurred by "small stations" is also consistent with findings of the Commission in the majority of financial forfeiture cases. Findings of "failure to retain records", "failure to maintain adequate records", "failure to keep records", and "no documentation of recruitment efforts" can be cited in almost every case involving licensees in small markets. Exhibit 4 hereto contains a summary of the findings of several financial forfeiture cases involving small market licensees. In addition to failing to undertake affirmative action efforts, almost each penalized station failed to maintain an adequate recordkeeping system.

If indeed the cost of recordkeeping is a mere \$350 for small market licensees, the case can hardly be made that such an obligation is overburdensome. It is in fact a small price to pay in order to demonstrate compliance with Commission policy designed to ensure that programming reflects the views and tastes of underserved segments of the public.

^{18/} Commenters question the accuracy of the "estimated" costs prepared by TAB. TAB Comments at 8. The accounting basis for these facially absurd estimates is nowhere presented. TAB does not explain why there is a discrepancy in the average cost for television stations, \$9,500 and radio licensees, nearly \$19,000. Given that the recordkeeping obligation is identical, one must conclude the data or methodology is seriously flawed. Indeed, it seems likely that these estimates reflect the costs of all recruiting, not just that portion of recruiting which effectuates EEO compliance.

E. Low Salaries Are Not An Impediment To EEO Compliance

The NAB, at 15-18, argues that low salaries impede minority employment. The NAB provides data purporting to show that small market stations pay less than large market stations. However, the NAB provides no evidence -- nor is there any -- that minorities require higher pay than whites. Without that showing, the NAB's argument falls on its face. See pp. 8-10 supra.

Ninety-Eight Licensees, at 14, cite <u>Florida NAACP v. FCC</u>,

No. 93-1162 (D.C. Cir., decided May 27, 1994) ("<u>Florida NAACP</u>") for
the proposition that low pay may be an impediment to minority
employment.

Florida NAACP has been misread by Ninety-Eight Licensees. There, the claim was that a low rate of pay might not be a sufficient incentive for residents of Tampa and St. Petersburg, regardless of their race, to do a 46-mile round trip commute to work. 19/ Consequently, the Court held that the Commission could (but was not required to) decline to find intentional discrimination and refuse to hold a hearing. 20/

Virtually every broadcaster thinks it pays less than others. Thus, it would be far too facile to allow a licensee to argue -- without supporting documentation -- that "low pay" impedes

^{19/} Florida NAACP is an anomoly. There was not a shred of evidence in the record regarding the stations' salary levels or the salary levels of other stations in the Tampa/St. Petersburg market. Furthermore, the 23-mile reverse commute was claimed by the licensee to require an hour -- an obviously suspicious claim.

^{20/} Noting that the licensee neither recruited nor hired a single African American, and appeared to have no meaningful EEO program, the Commission had issued a short term renewal and an \$18,000 forfeiture -- which, at the time, was nearly the highest forfeiture ever issued.

EEO compliance. Indeed, the "low pay" argument is based on a rather silly presumption: that minorities are materially less willing to work for low wages than nonminorities. That argument assumes that minorities are <u>overrepresented</u> and overvalued in broadcasting, and thus that the real discrimination victims are whites. The reverse is true in virtually every industry, including broadcasting. Discrimination and other factors typically result in substantial pay differentials between minorities and whites. Thus, one arguing "low pay" ought to find EEO compliance easier, since whites tend to gravitate away from low paying jobs more than will minorities.

F. Broadcasters Should Not Be Permitted To Use Alternative Labor Force Data

The NAB, at 18, argues that small market broadcasters should be permitted to use "alternative labor force data." While such data might be relevant in a hearing on discrimination, it is not appropriate in evaluating compliance with the affirmative action provisions of the EEO Rule. The goal of those provisions is the promotion of diversity. NAACP v. FPC, supra. That means, ideally, that the composition of the stations' workforce should resemble the composition of the audience.

Part of the NAB's argument is that suburban stations should be able to use suburban (mostly white) workforce data, thus ignoring the inner cities. See also Dow Lohnes Comments at 11-14. To permit this, the Commission would need to overrule the reasoning approved by the D.C. Circuit in Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972). There, the Court affirmed the Commission's holding that a Washington, D.C. television station would not be held to a diversity goal of parity with the over 70% African American

composition of the community of license. It follows that if suburban stations are to receive the benefits of residential segregation in the form of exclusion of central city populations from their employment base, then central city licensees must compensate by tying their employment goals to the population of the central cities. This may not be a result most broadcasters desire.

Dow Lohnes, at 14-16, suggests that licensees should be permitted to use "refined" workforce statistics representing the availability of "qualified" minorities for particular jobs. The Commission has rejected this argument for decades and it should continue to do so, for three reasons. First, the use of statistics infected by the effects of historic discrimination can only perpetuate that discrimination. Second, no commenter claims that broadcast jobs are so esoteric that most reasonably well educated persons cannot be trained for most broadcast positions. Third, the EEO Rule is intended to promote diversity as well as equal opportunity, mandating the use of the audience's composition as the relevant benchmark.

G. Joint Recruitment Efforts Are Permitted
Now. What Some Industry Commenters Appear
To Seek Is A Shift In Responsibility For
EEO Compliance To Non-Accountable,
Non-Licensees

The NAB, at 20-24, argues that joint recruitment efforts should be encouraged. While facially a constructive suggestion, it is puzzling why the NAB feels that the Commission's imprimatur is needed on joint recruitment efforts. Such efforts are nothing new, and there is no impediment to them.

Apparently, the NAB is arguing that joint recruitment efforts are "downgraded" because they are not "minority-specific." The NAB, at 21, suggests that joint recruitment efforts, "by law,

cannot specifically target minorities and females[.]" What law? These are private initiatives, and they can target whomever they want. The NAACP and AWRT certainly target their constituents without fear of any nonexistent restrictions on freedom of association. The Commission should take this opportunity to point out that there is nothing unlawful about a private industry effort aimed specifically at targeting minorities or women.

The Commission should recognize that there is danger in allowing unlimited use of "joint" recruitment efforts. Through such efforts, licensees may intend to subdelegate to others the nitty-gritty work of EEO recruitment. There are two dangers in this. First, licensees may claim that the failure of these joint efforts to produce results immunizes them from EEO scrutiny. This is often the tactic used by major companies which use third parties to recruit secretarial or temporary help. $\frac{21}{}$ Second, the use of joint efforts prevents a individual licensee from developing the name recognition and reputation in the community as an equal opportunity employer. Criticism of minority organizations for not referring large numbers of persons often miss this important point. For example, even though a local community organization may not refer a large number of people in response to job openings, the fact that the employer notifies the organization of <u>all</u> openings (and not just secretarial or janitorial openings) cannot but help establish the employer in the community organization's mind as a

^{21/} Over the past four years, the New York State Attorney General has prosecuted four job placement companies for catering to the discriminatory preferences of large corporate clients in making referrals. In every case, the corporate clients, which included major banks, insurance companies and Fortune 500 company headquarters, blamed the placement companies for sending them only whites.

fair place to work. The community organization is likely to make this known to its members, who, in turn, will apply for jobs or encourage others to do so. That is how a reputation is built. These dynamics help explain, for example, why some licensees generate large numbers of minority "walk-in" applicants apparently derived from no particular source, while other licensees do not generate these minority walk-ins. A licensee's reliance on such hands-off, impersonal means as joint recruitment efforts, without also conducting its own efforts, prevents the development of a pro-active community reputation for the licensee. Thus, joint efforts should be encouraged as supplementing, but not substituting for local recruitment efforts.

H. Training of Minorities Should Be A Factor In Meeting EEO Obligations

Commenters support the suggestion of the Foundation for Minority Interests in Media (at 2-3) that the Commission should adopt a policy making the long term training of minority employees a plus factor in meeting EEO obligations. Training and mentoring programs are viable ways for licenses to insure that they have a pool of qualified candidates for employment vacancies. Long term training also increases the chances that minority employees will be retained and promoted into decision making positions. The Commission should provide incentives for licensees to engage in programs such as the one sponsored by the Foundation.

I. The EEO Rule Should Extend To Persons With Disabilities

Commenters support The United Cerebral Palsy Association's (UCPA) suggestion that the Commission require licensees to report their recruitment and hiring of persons with disabilities. If true programming diversity and full service of local communities is to

be achieved, the Commission must include persons with disabilities -- a group traditionally discriminated against and whose programming needs have long been ignored -- in its EEO regulations. UCPA notes that the disabled community included 43 million Americans, yet very few are employed in the communications industry. This fact is reflected in programming. A study of local television news portrayals of persons with disabilities commissioned by the University of Colorado School of Journalism and Mass Communications on behalf of the Office of Communication of the United Church of Christ in October, 1993 found that only a fraction of the sampled local programming was devoted to coverage of persons with disabilities. Two of the stations that aired such programming had disabled employees in decision making positions. Clearly, employees with disabilities can focus a licensee's attention to issues within the disabled community, and insure that the coverage given to them is balanced and fair.

J. Broadcasters Should Be Encouraged To Do Business With Minority Vendors

Ninety-Eight Licensees, at 18-19, oppose any requirement that broadcasters report on their use of minority vendors. They argue that "it is difficult to see how the contracting requirement would promote the Commission's goal of program diversity, and by definition the selection of <u>outside</u> contractors would not increase the representation of minorities or women in broadcast station staffs" (emphasis in original).

Ninety-Eight Licensees' comment ignores the critical role of networking in the employment marketplace. Contacts made through trade and business -- including dealings with vendors -- often blossom into job opportunities for those associated with the

vendor. For example, broadcast stations commonly hire salespeople from the ranks of those who sell goods and services to them.

Indeed, the absence of minorities from commercial networking opportunities is among the primary reasons the EEO Rule was needed in the first place.

II. COMMISSION EVALUATION OF BROADCASTERS' EEO PERFORMANCE

A. A Licensee Which Has Met The Processing Guidelines, But Not The "Efforts" Requirement, Should Not Be Deemed To Have Complied With the EEO Rule

The NAB, at 9-11, urges that attainment of 50% of parity should immunize a licensee from further EEO scrutiny. <u>See also</u> TAB Comments at 4-6.

The NAB, at 10, concedes that "such an enforcement system could be viewed as establishing a 'quota' system." Actually, it would create a ceiling where the floor is supposed to be.

The purposes of EEO review at renewal time are (1) to determine whether discrimination occurred; and (2) to develop a prediction of the likelihood of future EEO compliance. Operation at 50% of parity is nothing to write home about; by itself, it bespeaks operation at the very margin between possible compliance and probable noncompliance. When a licensee operates at that level, the Commission must endeavor to learn much more in order to predict future compliance -- including the intensity and consistency with which recruitment and hiring occurs.

One critical number which must be known to predict future EEO performance is the rate of minority hires. The hiring rate -- essentially the first derivative of the employment profile -- must exceed 100% of parity in order for the licensee ever to achieve parity. If the hiring rate is less than 100% of parity, it is

mathematically impossible for the station ever to achieve parity in its employment profile.

A good argument can be made that consistent operation in excess of 100% of parity should allow the Commission to excuse lapses in effectuation of EEO procedures. However, that already happens. Commenters can recall no instance in which the Commission sanctioned or even investigated a licensee which operated in excess of parity throughout the license term.

If a licensee truly did all it could reasonably have done
-- recruited with minority sources for every vacancy, courted those
sources assiduously, reevaluated its sources' effectiveness
periodically and hired qualified minority applicants, it is
inconceivable either that the Commission would sanction the
licensee or that a reasonable petitioner to deny would challenge
its renewal application.

B. The Commission Must Continue To Monitor Licensees' Recruiting Efforts

Ninety-Eight Licensees advocate the elimination of the 66/33% recruitment standard on the grounds that it "creates confusion" and "unfairly imposes sanctions on licensees who meet the 50/50 guideline." Ninety-Eight Licensees at 11. This comment reflects a misunderstanding of the Commission's EEO Rule, which requires licensees to continue to recruit, promote, and retain minorities and women even after numerical standards have been met. As the Commission has stated many times in the past, the 50% parity guideline is not a "safe harbor" -- a licensee must keep up its EEO efforts on all fronts. Thus, even if a licensee's current employee profile meets the processing guidelines, it must continue to